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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO., INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

v.

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 263 F. 2d 244.

The opinion of the United States District Court for the Southern District of New York is reported at 166 F. Supp. 129.

Jurisdiction

Petitioners predicate the jurisdiction of this Court upon 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which petitioners allege to be involved herein are set forth in Appendix "A" to the petition herein.

Questions Presented

We believe that petitioners do not raise any substantial federal questions herein and that all of the questions herein which petitioners allege to be substantial have already been foreclosed by decisions of this Court.

We further believe that the decision of the Court of Appeals herein does not conflict with any decision of this Court.

Statement

Petitioners, who are business and residential tenants in the Lincoln Square area of the Borough of Manhattan in the City of New York, brought this action to enjoin the prosecution of the Lincoln Square Title I Urban Renewal

Project (hereinafter referred to as the "Lincoln Square Project" or as the "Project") and to have certain actions of the Federal Housing and Home Finance Agency (hereinafter referred to as the "HHFA") and The City of New York (hereinafter referred to as "the City") relating to the Project declared illegal.

The Lincoln Square Project envisages the reclamation and the redevelopment of a thirteen-block portion of the Lincoln Square area (hereinafter referred to as the "Project Area"). The Project is divided into five component parts—the Collegiate Site, the Cultural Site, the Institutional Site, the Residential Site and the Co-Operative Site. Respondent Webb & Knapp Lincoln Square Corporation (hereinafter referred to as "Webb & Knapp") is the redeveloper only of the Project's Residential Site. As such redeveloper, Webb & Knapp is now relocating tenants from the Residential Site and demolishing the existing buildings thereon and will erect thereon modern, fireproof multiple dwellings and related retail facilities.

Petitioners commenced this action on June 16, 1958 by filing a complaint with the Clerk of the United States District Court for the Southern District of New York. Petitioners served the summons and complaint herein upon all respondents between June 17, 1958 and June 20, 1958.

Thereafter, respondents moved to dismiss the complaint and for summary judgment and petitioners moved for a preliminary injunction.

On August 5, 1958, the District Court (Dimock, J.) granted respondents' motions to dismiss the complaint and for summary judgment and denied petitioners' motion for a preliminary injunction.

On August 28, 1958, petitioners filed a notice of appeal from the order and judgment of the District Court. On January 16, 1959, the Court of Appeals for the Second Circuit (Clark, C. J., and Hincks and Lumbard, J.J.s) affirmed the order and judgment of the District Court. On February

11, 1959, an order was made and filed making the judgment of the Court of Appeals the judgment of the District Court.

Petitioners then filed the present petition to this Court.

Argument

We understand petitioners' contentions in this Court to be as follows: (a) that the use of federal funds for the Lincoln Square Project raises a substantial federal question (petition, pp. 9-11); (b) that the denial by the HHFA of petitioners' request to be heard in support of their objections to the relocation plan for the Lincoln Square Project raises a substantial federal question (petition, pp. 11-16); and (c) that the decision of the Court of Appeals herein with respect to those two issues conflicts with applicable decisions of this Court (petition, pp. 9-11, 11-16).

The brief of respondents Cole and Fried herein will adequately demonstrate that the denial by the HHFA of petitioners' request to be heard does not raise a substantial federal question and that the decision of the Court of Appeals herein with respect to that issue does not conflict with applicable decisions of this Court.

Accordingly, in this brief, we endeavor to show that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question and that the decision of the Court of Appeals herein permitting such use of federal funds does not conflict with applicable decisions of this Court.

I

The use of federal funds for the Lincoln Square Project does not raise a substantial federal question.

Petitioners assert that the use of federal funds for the Lincoln Square Project raises a substantial federal ques-

tion not heretofore resolved by this Court (petition, pp. 9-11).

Petitioners base that assertion upon the ground that the use of federal funds for a slum clearance project involving a sectarian institution violates the "establishment of religion" clause of the First Amendment.

Specifically, petitioners allege (petition, p. 11):

> "Here, where the provisions of the plan and the sponsorship contract provided for the sale of an educational site to Fordham University for a sum about 3½ million dollars less than its cost of acquisition (two-thirds of which is payable by the federal government) and land use restrictions which lowered the land value were adopted with Fordham University—and only Fordham University—in mind and in contemplation, federal support and approval were prohibited by principles of separation of church and state based upon the 'establishment of religion' clause of the First Amendment."

In short, petitioners' challenge is based upon the resale of the Collegiate Site of the Lincoln Square Project to respondent Fordham University (hereinafter referred to as "Fordham"), a denominational educational institution, at a "writedown" from the cost of acquisition.

(a)

First, we submit that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question because of this Court's denial of the petition for a writ of certiorari in *64th Street Residences, Inc., et al. v. City of New York, et al.*, 4 N. Y. 2d 268, 150 N. E. 2d 396, *cert. denied sub nom. Harris, et al. v. City of New York, et al.*, 357 U. S. 907.

The *Harris* case came up through the New York courts and reached this Court on a petition for a writ of certiorari to the New York Court of Appeals.

In the *Harris* case—as in this case—tenants in the Lincoln Square area challenged the validity of the Lincoln Square Project on the ground that the sale of the Collegiate Site to Fordham at a writedown violates the "establishment of religion" clause (petition for certiorari, October Term, 1957, No. 1014, pp. 14-15).

The only difference between the *Harris* case and this case on the "establishment of religion" issue is that, in the *Harris* case, in challenging the validity of the Lincoln Square Project, the petitioners therein attacked both the use of City funds and the use of federal funds (petition for certiorari, October Term, 1957, No. 1014, pp. 14-15) whereas, in this case, petitioners' attack is limited to the use of federal funds (petition, p. 11).

In the *Harris* case, this Court refused to review a decision of the New York Court of Appeals which had held specifically that the sale of the Collegiate Site to Fordham at a writedown did not violate the "establishment of religion" clause. The New York Court of Appeals had stated (4 N. Y. 2d at 275-276, 150 N. E. 2d at 398-399):

> "Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to

raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

"Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding."

(b)

Second, we submit that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question because the circumstances surrounding the re-use of a slum clearance area are irrelevant in determining the validity of a slum clearance project.

Under Title I and similar statutes, land is condemned by a municipal agency to achieve the public purpose of slum clearance and then re-sold to a redeveloper (see pp. 12-13, *infra*, for a discussion of the course of a Title I project).

The courts of New York have held that a taking for slum clearance is in itself a taking for a public purpose, and that the nature of the re-use is irrelevant.

Thus, in *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659, *cert. denied*, 347 U. S. 934, the New York Court of Appeals stated (306 N. Y. at 93, 115 N. E. 2d at 669-670).

> "Section 72-k of the General Municipal Law is drawn upon the basis, upheld in *Matter of Murray* v. *La Guardia*, that slum clearance is in itself a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital. The State Constitution does not require that slums shall be rehabilitated exclusively by reconstruction for low cost housing, which is a different public purpose that may or may not be superimposed on slum clearance (*Matter of Murray* v. *La Guardia*, *supra*). Consequently, except where an applicable statute requires, the slum area may be cleared, replanned, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary."

Since this Court has never condemned as a violation of the Constitution a taking upheld by a state court as a tak-

ing for public uses in conformity with its laws, *U. S. ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, 552, this Court should not look to the circumstances surrounding the re-use of an area to be cleared of slums.

In *Harris* v. *City of New York*, *supra*—as in this case—we opposed the petition for a writ of certiorari on the ground that the circumstances surrounding the re-use of the Lincoln Square Project were irrelevant in determining the validity of the Project (brief in opposition to petition for certiorari, October Term, 1957, No. 1014, pp. 6-8) and, as noted above, this Court denied that petition.

Our position finds further support in the decisions of this Court in *Burt* v. *Pittsburgh*, 340 U. S. 802, and *Berman* v. *Parker*, 348 U. S. 26.

In the *Burt* case, this Court affirmed, on the authority of the *Welch* case, *supra*, the judgment of a three-judge District Court which refused to look beyond the condemnation of a slum area to the character of the re-use.

In the *Berman* case, this Court, in affirming the dismissal by a three-judge District Court of an action seeking to enjoin a Washington, D. C. Title I project, refused to look to the circumstances of re-use as a ground for invalidating the project. This Court stated that the object—slum clearance—was within the power of Congress to attain and that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine" (348 U. S. at 33).

(c)

Third, assuming, *arguendo*, that the circumstances surrounding the re-use of a slum clearance area are relevant in determining the validity of a slum clearance project, we submit that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question under the "establishment of religion" clause in view of *Berman* v. *Parker*, *supra*.

In the *Berman* case, this Court, in upholding the constitutionality of the District of Columbia Redevelopment Act of 1945,* clearly indicated that a religious institution may participate in a Title I project. The Court said of the Title I project there challenged (348 U. S. at 34-35):

> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, *churches*, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. • • • Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power." (emphasis supplied)

Petitioners themselves admit that this allegedly substantial federal question may have been settled by the *Berman* case. Petitioners state (petition, p. 11):

> "Petitioners do not believe that the question presented has ever been settled by this Court unless that portion of the opinion in *Berman* v. *Parker*, 348 U. S. 26, 34-35, which states that it was within the power of Congress to authorize the District of Columbia Land Redevelopment Agency to attack the problem of Slum Clearance on an area or regional basis and to redesign the area so that a balanced integrated plan could be developed for the region, including not only new houses but also schools, churches, parks, streets and shopping centers', may be taken to mean that churches (and other religious institutions) may participate as urban redevelopers, and pay less than market value, or even nothing, for the land which they redevelop."

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* 60 Stat. 790; D. C. Code, 1951, Title 5, §§ 5-701—5-719.

II

The decision of the Court of Appeals herein permitting the use of federal funds for the Lincoln Square Project does not conflict with the applicable decisions of this Court.

Petitioners assert that the decision of the Court of Appeals herein permitting the use of federal funds for the Lincoln Square Project conflicts with the decisions of this Court in *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; and *Zorach* v. *Clauson*, 343 U. S. 306 (petition, pp. 9, 10).

In those three cases, this Court ruled that cities and states may not subsidize religious institutions, but none of those cases conflict with the case at bar.

In the *Everson* case, this Court, in upholding a New Jersey statute which authorized local school districts to make rules and contracts for the transportation of children to and from parochial schools, stated (330 U. S. at 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

In the *McCollum* case, this Court, in striking down a "released time" program of the Champaign, Illinois, public school system, reiterated the language of *Everson* quoted above.

In the *Zorach* case, this Court upheld a New York City "released time" program because it "involves neither religious instruction in public school classrooms nor the expenditure of public funds" (343 U. S. at 308-309).

Thus, the decision of the Court of Appeals herein could be held to conflict with the decisions of this Court in the *Everson, McCollum* and *Zorach* cases, *supra,* only if the use of federal funds for the Lincoln Square Project results in a subsidy to a religious institution.

Petitioners allege that the use of federal funds for the Lincoln Square Project results in a subsidy to a religious institution (a) because Fordham is one of the redevelopers of the Project and the Title I scheme necessarily results in the subsidization of the redeveloper (petition, p. 11) and (b) because of the particular facts underlying Fordham's participation in the Lincoln Square Project (petition, pp. 5-6, 10-11).

However, we contend (a) that a redeveloper does not receive a subsidy by participating in a Title I project and (b) that Fordham has not received a subsidy by participating in the Lincoln Square Project.

(a)

The course of a Title I project is in barest outline as follows: A municipal agency (e.g., a city) acquires a slum area. The agency then either sells (or leases), or clears and then sells (or leases), that area to a redeveloper, either at a negotiated price or after a public auction, subject to specific re-use restrictions. The difference between the cost of acquiring (or of acquiring and clearing) that area and the sales price paid by the redeveloper

for that area is shared by the agency and by the federal government. The redeveloper then redevelops that area in accordance with the redevelopment or renewal plan embodying the re-use restrictions.

If a subsidy lurks anywhere in the Title I scheme, it could only lurk in the differential between the cost of acquisition (or of acquisition and clearance) and the subsequent resale price. Petitioners contend that a subsidy does lurk there (petition, p. 11).

However, every court which has passed upon slum clearance projects has rejected the contention that the differential between the cost of acquisition (or of acquisition and clearance) and the resale price results in a subsidy.

That question was specifically raised by the petition for a writ of certiorari in *Harris* v. *City of New York, supra* (petition, October Term, 1957, No. 1014, pp. 14-15), and, as noted above, this Court denied that petition.

In *State* v. *Land Clearance, etc.*, 364 Mo. 974, 270 S. W. 2d 44, the court, in determining that the redeveloper of the project there involved had not been subsidized, stated (364 Mo. at 989-990, 270 S. W. 2d at 53):

> "It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy. Both the statute and the undertakings of respondents pursuant thereto so clearly demonstrate that the purpose in acquiring the land is to rid it of its blighted and insanitary condition and to thereafter convey it to redevelopers for conversion to useful purposes in accordance with the redevelopment plan. The great weight of authority is that there is no private grant when land is cleared for the purposes herein contemplated and is thereafter sold at a loss, but for its then fair value."

The statute involved in *State* v. *Land Clearance* is substantially equivalent to the statutes under which the Lincoln Square Project was condemned and sold. If anything, the *Land Clearance* statute was less likely to extract "fair value" than the statutes under which the Lincoln Square Project was condemned and sold.

In *People* v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626, the court, in upholding an Illinois slum clearance statute, stated (414 Ill. at 617, 111 N. E. 2d at 636-637):

> "Plaintiff's assumption of a donation to Normandy Homes, Inc., the prospective developer here, is erroneous. Section 19 does permit the Commission to sell land in a project to a developer at 'use value.' This term is defined as 'the value at which the Commission determines such land should be made available in order that it may be developed or redeveloped for the purposes specified in the plan presented.' Sections 3(l) and 14 provide that the land for blighted vacant area redevelopment projects must be developed for predominantly residential uses. The 'use value' will thus be the value of the land, subject to restrictions placed upon it by the statute and the redevelopment plan. In this there is no donation of land to a private corporation, nor is there any loan of credit. The constitutional prohibition is not a bar to a municipality entering into a transaction where there is an exchange of considerations between the parties."

Similarly, in *Velishka* v. *City of Nashua*, 99 N. H. 161, 106 A. 2d 571, the court, in upholding a New Hampshire slum-clearance statute, stated (99 N. H. at 168, 106 A. 2d at 575-6):

> "Section 5 of the act permits the housing authority to sell or lease the land in the project area 'at its use value' which may be less than the cost of acquisition, clearance and site improvements. The sale or lease to private enterprise is required to be made

subject to conditions that will insure that the blighted or slum conditions do not return. * * * The sale or lease is not a gratuity since it is made at its use value as a means of assuring the redevelopment in accordance with the redevelopment plan. Cf. *Opinion of the Justices*, 95 N. H. 548, 65 A. 2d 700. There is no grant of public funds for private purposes in violation of the Constitution since the housing authority may sell or lease the land only at a use value and for uses which are consistent with the continuous use of the redevelopment in accordance with the original public purpose and plans."

See also, *Cremer* v. *Peoria Housing Authority*, 399 Ill. 579, 594-595, 78 N. E. 2d 276, 284-285; *Foeller* v. *Housing Authority of Portland*, 198 Ore. 205, 236, 256 P. 2d 752, 767; and *Gohld Realty Co.* v. *City of Hartford*, 141 Conn. 135, 104 A. 2d 365.

Actually, far from being a subsidy, the differential between the cost of acquisition (or of acquisition and clearance) to the municipal agency and the sales price to the redeveloper results (a) from the fact that the acquisition cost includes not only the value of the land but also the value of the existing buildings which must thereafter be demolished; and (b) from the fact that the redevelopment contract imposes obligations and restrictions upon the redeveloper which lessen the value of the land itself. In the present case and in all other Title I projects in New York City, those obligations include the relocation of residential tenants, the removal of commercial tenants, the demolition of existing buildings and the construction of new improvements. Those restrictions require the redeveloper to use the land and the improvements which it erects only in accordance with the limitations set forth in the applicable redevelopment or renewal plan.

As the foregoing indicates, what petitioners claim is a subsidy is rather a bargained-for equivalent which either arm's length negotiations or a public auction insures is not a subsidy.

(b)

Petitioners contend that, regardless of the propriety of the Title I scheme in general, on the facts of this case Fordham has received a subsidy by its participation in the Lincoln Square Project (petition, pp. 9-11).

While the petition is unclear as to precisely how Fordham has received that subsidy, the petition hints that the subsidy stems (i) from the sponsorship contract between the City and Fordham (petition, p. 11); (ii) from the condemnation of the Collegiate Site (petition, p. 11); and (iii) from the restrictions imposed upon the redevelopment of the Collegiate Site (petition, pp. 5, 6, 10-11).

(i) Clearly, Fordham has not on the facts of this case received a subsidy through the sponsorship contract. The assurance therein that the City would sell the Collegiate Site to Fordham if it were the highest bidder was in no real sense a greater assurance than that granted to any prospective bidder at the public auction of that Site. On the other hand, the contract imposed the steep obligation solely upon Fordham to bid at least $2,241,610 for the Collegiate Site.

(ii) Equally clearly, Fordham has not received a subsidy by the condemnation of the Collegiate Site. The condemnation was an independent act of the City and was legally unrelated to the erection of the improvements contemplated by the Project. Certainly, the condemnation was not for Fordham. If anything, the condemnation was for the subsequent public auction and that auction was not held for Fordham's benefit.

(iii) Finally, Fordham has not received a subsidy through the restrictions on the re-use of the Collegiate Site. Those restrictions require that that Site be used exclusively for educational purposes for a period of forty years. Because of those restrictions, only educational

institutions could bid for that Site. However, that limitation upon the potential bidders for that Site hardly "subsidizes" any one educational institution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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